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No. 93-1040 and No. 93-1068

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1993

No. 93-1040

EMPRESA NACIONALE SIDERURGICA, S.A.,

*Petitioner,*

versus

JERRY YOUNG,

*Respondent,*

and

COOPER/T. SMITH STEVEDORING COMPANY, INC.,

*Respondent/Intervenor.*

No. 93-1068

ARMADORES DE CABOTAJE, S.A.,

*Petitioner,*

versus

JERRY YOUNG,

*Respondent,*

and

COOPER/T. SMITH STEVEDORING COMPANY, INC.,

*Respondent/Intervenor.*

**Petitions For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit**

## BRIEF OF RESPONDENT/INTERVENOR IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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## LIST OF PARTIES

The following are parties to the this proceeding:

1. Jerry Young, plaintiff/respondent;
2. Armadores de Cabotaje, S.A. – defendant/petitioner;
3. Cooper/T. Smith Stevedoring Company, Inc.[1] – intervenor/respondent; and
4. Empresa Nacional Siderurgica, S.A. – defendant/petitioner.

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[1] Pursuant to Supreme Court Rule 29.1, Cooper/T. Smith Stevedoring Corporation is the parent company of Cooper/T. Smith Stevedoring Company, Inc.; River Grain Elevators, Inc. and Paco Terminals, Inc. are the only two non-wholly owned subsidiary companies of Cooper/T. Smith Stevedoring Company, Inc.

TABLE OF CONTENTS

Page

LIST OF PARTIES ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE WRIT OF ENSIDESA ..... 4

1. GRANDERSON'S ALLEGED STATEMENTS DURING DELIBERATIONS MERELY REFLECT HIS EMOTIONAL REACTIONS AND MENTAL PROCESSES, AND ARE PROPERLY PROTECTED BY HIS RIGHT TO PRIVACY AND PROTECTION FROM HARASSMENT IN ACCORDANCE WITH ALL RELEVANT JURISPRUDENCE ..... 6

2. LOUISIANA'S PROCEDURES FOR DISALLOWING JUROR'S AFFIDAVITS TO IMPEACH THEIR OWN VERDICT IS SUBSTANTIALLY SIMILAR TO THE PARALLEL FEDERAL RULE AND IS CONSISTENT WITH ALL CONSTITUTIONAL PROVISIONS ..... 9

3. THE FOURTH CIRCUIT'S RULING THAT THE JURORS' AFFIDAVITS DID NOT DEMONSTRATE THE EFFECT OF OUTSIDE INFLUENCE IS EXACTLY WHAT COURTS AROUND THE COUNTRY HAVE HELD ON THE SAME ISSUE AND REFLECTS THE CONSTITUTIONAL BALANCE THAT HAS BEEN ESTABLISHED IN THIS WELL-SETTLED AREA ..... 10

REASONS FOR DENYING THE WRIT OF ARCASA.. 12

TABLE OF CONTENTS – Continued

Page

1. ARCASA FAILS TO STATE ANY REASONS WHICH INDICATE THAT THIS CASE IS APPROPRIATE FOR SUPREME COURT REVIEW ..... 16

2. THE TURNOVER DUTY OF SAFE CONDITION ENCOMPASSES THE METHOD OF CARGO STOWAGE..... 17

3. ACTUAL KNOWLEDGE OF THE NEGLIGENT STOWAGE OF CARGO BY THE VESSEL OWNER IS NOT NECESSARY ..... 19

4. THE OPEN AND OBVIOUS NATURE OF THE DANGEROUS CARGO CONDITION DID NOT RELIVE ARCASA OF A DUTY TO CORRECT THE CONDITION ..... 21

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

Page

CASES:

*Bennett v. Sedco Maritime*, 527 So.2d 894 (La. App. 3rd Cir. 1987) ..... 5, 9, 10

*Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204 (9th Cir. 1989) ..... 14

*Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 487 U.S. 1007, 108 S.Ct. 1733 (1988) ..... 15, 18, 19

*Jorgenson v. York Ice Machinery Corp.*, 160 F.2d 432 (2nd Cir. 1947) ..... 12

*Maldonado v. Missouri Pacific Railway Company*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1571 (1987) ..... 7, 9, 10

*Martinez v. Food City, Inc.*, 658 F.2d 369 (5th Cir. 1981) ..... 7

*Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50 (1892) ..... 8

*Morris v. Compagnie Maritime Des Chargeurs Runis*, 832 F.2d 67 (5th Cir. 1987) ..... 21

*Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1253 (5th Cir. 1982) ..... 21

*Pollizi v. M/V ZEPHYROS NO. II MONROVIA*, 860 F.2d 147 (5th Cir. 1988) ..... 22

*Raines v. Diamond M Company*, 396 So.2d 306 (La. App. 3rd Cir.), *writ denied*, 399 So.2d 623 (La. 1981) ..... 9

*Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993) ..... 14, 15

TABLE OF AUTHORITIES – Continued

Page

*Ryals v. Home Insurance Company*, 410 So.2d 827 (La. App. 3rd Cir.), *writ denied*, 414 So.2d 375 (La. 1982) ..... 10

*Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1615 (1981) ..... 12, 14, 20

*Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966) ..... 9

*Shillcutt v. Gagnon*, 602 F.Supp. 1280 (E.D.Wisc. 1985) ..... 11

*Smith v. Brewer*, 444 F.Supp. 482 (S.D.Iowa 1978) ..10, 11

*Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739 (1987) ..... 6, 7

*Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984) ..... 21

*Torres-Valencia v. United States*, 464 U.S. 44, 104 S.Ct. 385 (1983) ..... 16

*Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981) ..... 19

*United States v. Duzac*, 622 F.2d 911 (5th Cir. 1980) ...7, 8

*United States v. Riley*, 544 F.2d 237 (5th Cir. 1976), *cert. denied*, 430 U.S. 932, 97 S.Ct. 1554 (1977) ..... 9

*Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied sub nom, Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050, 110 S.Ct. 853 (1990) .....15, 19

STATUTES, CODAL PROVISIONS AND RULES:

33 U.S.C. §905(b) ..... 2, 13, 14

La.C.E. art. 606(B) ..... 4, 9, 10

TABLE OF AUTHORITIES – Continued

Page

Fed.R.E. 606(b) ..... 4, 7, 11

U.S. S.Ct. Rule 10.1 ..... 16

U.S. S.Ct. Rule 29.1 ..... i

MISCELLANEOUS:

H.R. Rep. No. 92-1441 *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698 (1972) ..... 13

S. Rep. No. 92-1125 (1972) ..... 13, 19

3 J. Weinstein & M. Berger, *Weinstein's Evidence*, §606[04] (1993) ..... 10

27 C. A. Wright & V. J. Gold, *Federal Practice and Procedure*, §6074 (1990, Supp. 1993) ..... 6

## STATEMENT OF THE CASE

On November 22, 1982, Jerry Young (hereinafter "Young"), a longshoreman employed by Cooper/T. Smith Stevedoring Company, Inc. (hereinafter "Cooper"), was injured while offloading a cargo of steel I-beams from the M/V LORENA, an oceangoing cargo vessel that was owned and operated by Armadores de Cabotaje, S.A. (hereinafter "ARCASA") and voyage chartered by Empresa Nacional Siderurgica, S.A. (hereinafter "ENSIDESA"). ENSIDESA, pursuant to a charter party with ARCASA, loaded stowed and arranged for discharge of the cargo of I-beams. ENSIDESA employees prepared a stowage plan for the cargo, which was approved by the master of the M/V/ LORENA, an employee of ARCASA.

ENSIDESA loaded the cargo of I-beams aboard the M/V LORENA in a "H" configuration, as opposed to the preferred "I" configuration. The "I" configuration is preferred because it does not destroy the wooden dunnage (scraps of wood placed between the layers of cargo), making the cargo easier and safer to discharge.

The M/V LORENA arrived in New Orleans in November 1982 to discharge a portion of its cargo. At this time, ENSIDESA hired Cooper to offload the cargo. Cooper's personnel inspected the vessel and her cargo before beginning the discharge operations. Despite the fact that the cargo was loaded in the "H" formation, the Cooper supervisor authorized the longshoremen to offload the cargo. Recognizing the situation, Cooper proceeded because ARCASA did not provide an alternative means of offloading the cargo. As Cooper offloaded the cargo,

the effects of the "H" beam loading method became more apparent. As the longshoremen got farther down into the hold, the crushed nature of the wooden dunnage became even more apparent. Indeed, at some locations, several bundles of I-beams were resting directly on the bundles below them.

In order to discharge the cargo, the longshoremen, including Young, were required to "nip" the beams by trying to wedge a "breakout wire" under the edge of the bundle of beams. Once the wire is beneath an end of a beam, the crane operator will lift the beam slightly enabling the longshoremen to place the chain which is actually used to lift the cargo beneath the slightly raised beams. This procedure is then utilized again on the other end of the bundle of beams. While attempting to nip a bundle of beams, a breakout wire slipped off, struck Young, causing him to fall and sustain injuries.

In October of 1984, Young filed suit against ARCASA for vessel negligence pursuant to the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. §905(b). Cooper intervened in that action, seeking to recover payments of medical expenses and compensation benefits paid to and/or on behalf of Young pursuant to the LHWCA. Young later amended his Petition to name ENSIDESA as a defendant as well. ARCASA and ENSIDESA both filed Cross-Claims for indemnity against the other. After a jury trial on April 17, 1989, the jury returned a verdict, finding ARCASA 15 percent at fault and ENSIDESA 85 percent at fault in causing Young's damages.

Following trial ENSIDESA obtained affidavits from three jurors, Cynthia Gleason, Gay Barbaran and Robert Jessup, Jr., who stated that during deliberations, one juror, Everett W. Granderson, Jr., repeatedly urged a verdict on grounds other than the evidence adduced at trial. Granderson allegedly stated that Young should prevail because he was a lone individual fighting corporations. Some of his remarks also allegedly appealed to racial bias and prejudice. One juror affiant stated that after deliberating almost ten hours, the jurors finally gave in to this particular juror out of frustration, and more than doubled the amount of what would have been their verdict.

On September 1, 1989, the District Court denied the Motions of ARCASA and ENSIDESA for judgment notwithstanding the verdict, new trial, and also dismissed their Cross-Claims for indemnity or contribution. ARCASA and ENSIDESA later moved for reconsideration and remittitur, which the District Court denied, entering final judgment on October 6, 1989.

The District Court's judgment also recognized Cooper's lien for compensation benefits. Immediately prior to the trial, the District Court severed Cooper's intervention, presumably so that it would be tried at a later date. However, all parties subsequently agreed to the amount and nature of Cooper's lien, and included Cooper's lien in the final judgment. Because Cooper's recovery is dependent on Young's recovery in the main demand, Cooper now appears before this Honorable Court as a respondent to the writs of ENSIDESA and ARCASA.

ARCASA and ENSIDESA both appealed to the Louisiana Fourth Circuit. The Fourth Circuit reversed the

District Court's dismissal of ARCASA's Cross-Claim, ordering ENSIDESA to indemnify ARCASA, and also reduced the damage award. All other aspects of the Judgment were affirmed.

ARCASA, ENSIDESA and Young all applied for a writ of certiorari or review with the Louisiana Supreme Court. On October 1, 1993, the Supreme Court denied the applications of all of the parties.

ARCASA and ENSIDESA have petitioned this Honorable Court for writs. Cooper submits this Brief in opposition to the petitions for writs filed by both ARCASA and ENSIDESA.

## REASONS FOR DENYING THE WRIT OF ENSIDESA

Louisiana Code of Evidence Article 606(B), which is patterned after Federal Rule of Evidence 606(b), states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the juror's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment concerning his mental processes in connection therewith, except that a juror may testify on the question of whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about

> which he would be precluded from testifying be received for these purposes.

Under this article, the affidavits of these three jurors as to matters or statements made by Granderson during deliberations was properly found by the Louisiana Fourth Circuit Court of Appeal to be inadmissible to question the validity of the jury verdict.

Prior to Louisiana's adoption of the code of evidence, a body of law allowed affidavits such as those offered by ENSIDESA for the limited purpose of showing that a juror responded untruthfully on voir dire. *Bennett v. Sedco Maritime*, 527 So.2d 894, 904 (La. App. 3rd Cir. 1987).

ENSIDESA argued that the affidavits were admissible to show that the juror in question violated his oath of impartiality. However, the exception cited should not be employed where the allegedly untruthful statement was a general one that the juror could render an impartial verdict. *Id.* Accordingly, the Louisiana Fourth Circuit ruled that the affidavits were inadmissible as they did not pertain to any outside influence and were also inadmissible to show that the juror in question violated his oath of impartiality.

## 1. GRANDERSON'S ALLEGED STATEMENTS DURING DELIBERATIONS MERELY REFLECT HIS EMOTIONAL REACTIONS AND MENTAL PROCESSES, AND ARE PROPERLY PROTECTED BY HIS RIGHT TO PRIVACY AND PROTECTION FROM HARASSMENT IN ACCORDANCE WITH ALL RELEVANT JURISPRUDENCE

The fact that a juror may not generally testify to impeach his own verdict is a policy well-founded in the history of the law. 27 C. A. Wright & V. J. Gold, *Federal Practice and Procedure,* §6074 (1990, Supp. 1993). The two main goals behind this policy are the finality of verdicts and the insulation from judicial scrutiny of jury value judgments underlying a verdict or indictment. "Obviously, the goal of finality is threatened if the validity of the jury's decision is under attack. Similarly, the power of the jury to choose what values to reflect in its decision may be eroded if the validity of the decision is at issue." Wright & Gold, *supra,* at 406. Thus, the court's review of affidavits regarding the emotional or mental processes of jury members would reveal the thought processes of the juror and could undermine the policy of protecting jury value judgments from judicial inspection.

Furthermore, if the irregularities in the jury room are internal occurrences (i.e., emotional or intellectual misconduct), the court should refuse to permit testimony on the issue of such misconduct. *Tanner v. United States,* 483 U.S. 107, 107 S.Ct. 2739 (1987). In *Tanner,* the petitioners asserted that, contrary to the holdings of the district court and the court of appeals, juror testimony on ingestion of

drugs or alcohol during the trial was not barred by Federal Rule of Evidence 606(b). However, the United States Supreme Court ruled that the voluntary intoxication of a juror, no matter how severe, does not constitute the type of outside influence about which jurors may testify at a post-verdict hearing. *Tanner,* 483 U.S. at 122, 107 S.Ct. at 2748. The Court further held that long recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry. *Id.*, 483 U.S. at 127, 107 S.Ct. at 2751.

The Court should also exclude testimony that the jury reached a decision based on bias, the desire to complete jury service, uncertainty regarding the correctness of a decision, or considered prejudicial evidence. *Maldonado v. Missouri Pacific Railway Company,* 798 F.2d 764 (5th Cir. 1986), *cert denied,* 480 U.S. 932, 107 S.Ct. 1571; *United States v. Duzac,* 622 F.2d 911 (5th Cir. 1980); *Martinez v. Food City, Inc.*, 658 F.2d 369 (5th Cir. 1981). In *Maldonado,* the defendant made a motion for a new trial based on an affidavit of one of the jurors which related to discussions during deliberations regarding the defendant's wealth and about giving the benefit of the doubt to the plaintiff. Here, the court ruled that the affidavit reflected certain subjective thoughts and emotions of the jurors that may have influenced their decisions during deliberations and, thus, were shielded from inquiry. *Maldonado,* 798 F.2d at 769.

In *Duzac,* the defendant's attorney moved for a mistrial based on certain prejudices among certain jury members. The defendant attempted to argue that the prejudices fell within the exception to the rule prohibiting jurors from impeaching their verdict. *Duzac,* 622 F.2d at

913. That exception allowed a court to set aside the verdict where there was evidence that improper external influences were brought to bear on one or more of the jurors. *Id.; see also, Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 52-53 (1892). In *Duzac*, the Fifth Circuit ruled that there was no evidence of any external influence brought to bear on members of the jury. The prejudice complained of was alleged to be the product of personal experience unrelated to the litigation. The court further ruled that the proper time to discover such prejudices is when the jury is being selected and peremptory challenges are available to the attorneys.

> Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations. We therefore hold that the trial court acted properly in denying appellant's motion for a new trial.

*Duzac*, 622 F.2d at 913. Finally, the *Duzac* court held that post-verdict inquiries that took to probe the mental processes of the jurors are impermissible. *Id.*

In accordance with the above line of jurisprudence, the affidavits relating to any alleged statements made by Granderson during the deliberations merely reflect his mental processes and emotional reaction to the evidence heard at trial and should properly be protected by his right to privacy and protection from harassment.

## 2. LOUISIANA'S PROCEDURE FOR DISALLOWING JUROR'S AFFIDAVITS TO IMPEACH THEIR OWN VERDICT IS SUBSTANTIALLY SIMILAR TO THE PARALLEL FEDERAL RULE AND IS CONSISTENT WITH ALL CONSTITUTIONAL PROVISIONS

Both state and federal courts have generally disfavored post-verdict interviewing of jurors. The courts have repeatedly refused to "denigrate jury trials by afterwards ransacking the jurors in search of some new ground, not previously supported by evidence, for a new trial". *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976), *cert. denied*, 430 U.S. 932, 97 S.Ct. 1554 (1977). Furthermore, as the Supreme Court has declared:

> The courts must take such steps by rule and regulation that will protect its processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.

*Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966).

Pursuant to La.C.E. art. 606(B), juror affidavits are generally not considered by the courts. However, exceptions are recognized when jurors have not been truthful during voir dire. *Bennett, supra; Raines v. Diamond M Company*, 396 So.2d 306 (La.App. 3rd Cir.), *writ denied*, 399 So.2d 623 (La. 1981). Also, the federal rule, from which article 606(B) derives, allows an exception for statements which tend to show deceit during voir dire. *Maldonado*, 798 F.2d at 770. However, the exception cited is not to be employed where the alleged untruthful statement was a

general one that the juror could render an impartial verdict. *Id.; Bennett,* 527 So.2d at 904; *Ryals v. Home Insurance Company,* 410 So.2d 827 (La. App. 3rd Cir.), *writ denied,* 414 So.2d 375, 376 (La. 1982). Thus, the affidavits should not be considered to attack Granderson's statements during voir dire because ENSIDESA's argument is directed only to an alleged general statement by Granderson that he could be impartial.

### 3. THE FOURTH CIRCUIT'S RULING THAT THE JURORS' AFFIDAVITS DID NOT DEMONSTRATE THE EFFECT OF OUTSIDE INFLUENCE IS EXACTLY WHAT COURTS HAVE HELD ON THE SAME ISSUE AND REFLECTS THE CONSTITUTIONAL BALANCE THAT HAS BEEN ESTABLISHED IN THIS WELL-SETTLED AREA

Jury conduct which occurs in the jury room and injects a note of bias into the deliberations does not fit neatly on one side or the other of the dichotomy drawn in article 606(B). 3 J. Weinstein & M. Berger, *Weinstein's Evidence,* §606[04] (1993). The problem is whether such wholly intrajury statements can be viewed as extraneous information or an outside influence and, if so, whether the proof of such statements can be separated from proof of the effect of the statements on the mental processes of the jurors. *Smith v. Brewer,* 444 F.Supp. 482 (S.D.Iowa 1978). One prominent commentator has concluded that generally it seems better to draw the line in favor of juror privacy; in the heat of juror debate, all kinds of statements may be made which have little effect on outcome, "though taken out of context they seem damning and absurd." Weinstein & Berger, *supra,* at 606-636.

The general rule favoring the inadmissibility of juror testimony to impeach a verdict on the basis of alleged biased conduct occurring within the jury room is supported both by the language of Rule 606(b) and its legislative history. *Smith*, 444 F.Supp. at 489. The rule also applies where a litigant seeks to impeach a verdict by introducing evidence that a jury exhibited prejudice toward a party during deliberations. *Shillcutt v. Gagnon*, 602 F.Supp. 1280, 1282 (E.D.Wisc. 1985).

> Impeachment of jury verdicts on the ground that a juror has expressed racial or other bias would defeat the important interest of free and open jury deliberations and the finality of judgments. Jurors would be inhibited during deliberations by the knowledge that their statements might be disclosed to the public by a fellow juror. The exposure of statements made during deliberations would be commonplace since, if courts were to recognize a party's right to prejudice-free deliberations, the law would also have to allow all parties an equal opportunity to vindicate the right.

*Id*, at 1282. Impeachment of jury verdicts on the basis of prejudicial remarks would seriously undermine the finality of the verdict and the public's respect for them. "Where deliberations are lengthy, counsel would frequently succeed in finding an arguably prejudiced remark by a juror, perhaps made in the heat of debate and taken out of context." *Id*. Thus, the result would be the constant attack of jurors subsequent to a verdict in efforts to get a verdict impeachment hearing after every unfavorable ruling.

As Judge Learned Hand observed in *Jorgenson v. York Ice Machinery Corp.*, 160 F.2d 432, 435 (2nd Cir. 1947), the defects in the jury's verdict which the petitioner cites are intrinsic to a system which uses lay jurors and cannot be eliminated without eliminating the system itself:

> It would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test; and although absolute justice may require as much, the impossibility of achieving it has induced judges to take a middle course, for they have recognized that the institution could not otherwise survive; they would become Penelopes, forever engaged in unraveling the webs they wove. Like much else in human affairs, its defects are so deeply enmeshed in the system that wholly to disentangle them would quite kill it.

## REASONS FOR DENYING THE WRIT OF ARCASA

In 1972, the United States Congress amended the LHWCA, thereby eliminating a vessel owner's liability to the longshoremen for unseaworthy conditions aboard the vessel, but retaining the owner's liability for its own negligence. The extent of this standard of care was not elucidated by Congress; rather, this task was left to the courts to resolve "through the 'application of accepted principles of tort law and the ordinary process of litigation'." *Scindia Steam Navigation Co., Ltd. v. De Los Santos,*

451 U.S. 156, 166, 101 S.Ct. 1615, 1621 (1981) (quoting, S. Rep. No. 92-1125, p. 11 (1972)). The 1972 Amendments abolished a vessel's absolute liability to injured longshoremen under the unseaworthiness doctrine, but retained the longshoremen's statutory action against vessels for negligence under 33 U.S.C. §905(b). Additionally, the amendments barred vessels from seeking indemnity from the longshoremen's employer-stevedore.

The legislative object of these amendments was "to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third-party damage action is concerned." House Rep. No. 92-1441, *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4703. Summarizing the purpose of the 1972 Amendments to the LHWCA, the House Report concluded:

> Permitting actions against a vessel based on negligence will meet the objective encouraging safety because the vessel will still be required to exercise the same care as a landbased person in providing a safe place to work. Thus nothing in this bill intended to derogate from the vessel's responsibility to take appropriate corrective action where it *knows or should have known* about a dangerous condition.

*Id.* at 4704 (emphasis added).

Pursuant to the dictates of Congress, the courts have accepted this responsibility, and set out to determine what the vessel owner's duties are under the LHWCA. In *Scindia,* this Court granted certiorari to resolve a disagreement among the circuit courts concerning the applicable standard of care owed by a vessel to a

longshoreman under Section 905(b). The *Scindia* court laid out what a vessel's duty of reasonable care under the circumstances is to a stevedore and his longshoreman. In so doing, the Court drew a line between "turnover" duties (those which arise before the vessel is turned over to the stevedore and his longshoreman), and the other duties which arise after the vessel is turned over. The instant case involves solely the first duty, that of "turnover."

The *Scindia* court:

> . . . determined that a vessel's turnover duties extend *at least* to: (1) having the ship, its equipment, gear and tools, and the work space to be used in stevedoring operations in such a condition that an experienced stevedore can by exercising reasonable care carry on its cargo operations with reasonable safety ("the turnover duty of safe condition"); and (2) warning the stevedore of *hidden* dangers that are known to the vessel or should have been known to it in the exercise of reasonable care with respect to any hazards on the ship, in its equipment, gear or tools, or in the work space ("the turnover duty to warn").

*Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442, 1444-45 (9th Cir. 1993); see, *Scindia*, 451 U.S. at 167, 101 S.Ct. at 1622; *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1207 (9th Cir. 1989). It is only the turnover duty of safe condition that is at issue here.

Petitioner ARCASA argues that the circuit courts are in disagreement over application of the turnover duty of safe condition. However, this turnover duty has remained remarkably constant throughout all circuit courts, with

slight variations occurring because of the individual facts of each case. Rather than espousing different tenets of law, each circuit is deciding the cases within the applicable *Scindia* duties based on their individual facts.

The Third Circuit in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 487 U.S. 1007, 108 S.Ct. 1733 (1988), concluded that the turnover duty ordinarily did not include insuring of the safety of the method of the cargo stowage and, therefore, no corresponding duty to intervene to remedy the dangers created by negligently loading cargo.

The Fifth Circuit analyzed the issue slightly differently, but came to a similar result. The Fifth Circuit extends the turnover duty of safe condition, within the duty of ensuring the safety of "work space" in which the stevedore will be performing his cargo operation, to include responsibility for the reasonable safety of the cargo stow in all cases. *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied sub nom, Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050, 110 S.Ct. 853 (1990). Likewise, the Ninth Circuit in *Riggs* clarified the turnover duty of safe condition to include dangers of cargo stowage which are open and obvious.

As a corollary of this duty to furnish a reasonably safe vessel, the Fifth and Ninth Circuits concluded that vessel owners are liable for negligent stowage of cargo when the vessel owner knows or should have known of the dangerous condition. *Woods*, 873 F.2d at 851-52; *Riggs*, 8 F.3d at 1445. In the instant case, the Louisiana Fourth Circuit analyzed the facts and found ARCASA liable because the evidence led to the conclusion that it "knew

or should have known that this method of stow presented these [unreasonable] risks to longshoremen." Because it was found liable, ARCASA petitions this Court to grant certiorari to resolve this "split" regarding the duty a vessel owner owes to a longshoreman injured during cargo offloading operations.

## 1. ARCASA FAILS TO STATE ANY REASONS WHICH INDICATE THAT THIS CASE IS APPROPRIATE FOR SUPREME COURT REVIEW

Supreme Court Rule 10.1 states that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10.1 lists reasons for which the Court may invoke its discretion. While petitioning this Court for review to "resolve a split in the Circuit Courts of Appeals," ARCASA fails to mention that the instant case is not a decision by a federal circuit. In fact, it is not even a decision by the Louisiana Supreme Court; rather, it is a decision from a state circuit court, with no precedential weight outside of the bounds of its jurisdiction. Hence, the "conflict" is not one that should trigger Supreme Court interest or review. Rather, this conflict would fall within the lines of what is known as a "tolerable conflict." As the Honorable Justice Rhenquist stated in dissent, "This Court can only deal with a certain number of cases on the merits in any given Term, and therefore some judgment must attend the process of selection." *Torres-Valencia v. United States*, 464 U.S. 44, 104 S.Ct. 385 (1983) (Rhenquist, J., dissenting).

## 2. THE TURNOVER DUTY OF SAFE CONDITION ENCOMPASSES THE METHOD OF CARGO STOWAGE

ARCASA argues that once a vessel owner allows a stevedore to commence loading, the vessel owner is thereafter absolved of any responsibility or duty concerning the stowage of the cargo. ARCASA emphasizes greatly that the *Scindia* court "did not mention or refer to the duty extending to the *cargo*." This argument is understandable, in that the *Scindia* case did not specifically deal with cargo, but dealt with the defective equipment of a vessel. Therefore, many of its tenets are couched in language referring to equipment rather than other, more general terms.

The rule of law which is distilled from the facts of *Scindia* is quite simple: While the vessel has no duty to inspect the cargo handling operations, it has a duty, prior to the commencement of cargo operations, to provide a vessel which is reasonably safe for the longshoremen to load or offload the cargo. Consequently, once ARCASA and the M/V LORENA arrived at port, prior to cargo operations beginning, ARCASA had a duty to ensure that no dangerous conditions existed, and if such a danger did exist, to remedy it before turning over the vessel to the stevedore.

Once cargo operations begin, the vessel owner is no longer liable for new hazards that may arise as a result of defective cargo, or dangerous loading or offloading procedures. ARCASA seeks to argue that a vessel should be able to discharge to obligations by merely refusing to

examine a potentially dangerous situation, thereby avoiding the specter of "actual knowledge." This position is simply unreasonable. ARCASA or any other vessel owner cannot and should not be permitted to allow a stevedor to begin unloading cargo, and then claim, once a longshoreman is injured, that the accident arose out of "cargo operations," and that since the vessel owner did not have a duty to supervise these operations, it is relieved of liability.

In the instant case, both the District Court and the Louisiana Fourth Circuit concluded that ARCASA knew or should have known that the stowage of the I-beams in the "H" configuration increased the risk to the Cooper longshoremen, including Young. In so concluding, the Louisiana Fourth Circuit found that ARCASA was negligent in failing to exercise due care to make safe the portions of the ship that it turned over to the stevedore prior to the stevedore beginning his work. Since the cargo stowed aboard the vessel will be turned over to the stevedore as well, it too *must* be inspected for safety.

The *Scindia* court did not address the issue of cargo, as any discussion of this issue would have been necessarily dicta. While ARCASA emphasizes the negative language in *Derr,* it does not take notice that even *Derr* admitted that in certain situations there is a duty for the vessel owner to intervene to remedy dangers created by negligently loaded cargo. *Derr,* 835 F.2d at 496.

### 3. ACTUAL KNOWLEDGE OF THE NEGLIGENT STOWAGE OF CARGO BY THE VESSEL OWNER IS NOT NECESSARY

It is a corollary of the turnover duty of safe condition that a vessel owner does not have to have actual knowledge of the negligent stowage conditions. While ARCASA submits that this turnover duty should be no greater than that owed to a longshoreman once cargo operations have begun, the application of the "knew of should have known" standard is correct. The duty is not, as petitioner argues, with respect to the cargo, but rather to the method of cargo stowage. The Third, Fifth and Ninth Circuits are in accord that at times, a vessel owner may be required to intervene to remedy the dangers created by negligently loaded cargo. *Derr*, 835 F.2d at 496; *Woods*, 873 F.2d at 850; *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1304 (9th Cir. 1981). This holding is in accord with Congressional intent when it enacted the 1972 Amendments to the LHWCA. *See*, e.g., S. Rep. No. 92-1125, p. 10, 11 (1972) [Nothing enacted was intended to "derogate from the vessel's responsibility to take appropriate corrective action where it *knows or should have known* about a dangerous condition" as long as the vessel was not "chargeable with the negligence of the stevedore or employees of the stevedore." (emphasis added)]

Additionally, ARCASA misstates the statements made by this Court in *Scindia*. Petitioner states that "a vessel owner has no general duty by way of supervision of [sic] inspection concerning the work of the loading stevedore once operations commence." (Petn., p. 22) ARCASA goes further, stating that *Scindia* holds "without

equivocation that the determination whether to proceed with cargo operations is a matter of judgment committed to the stevedore." (Petn., p. 22) However, *Scindia* does not say that the judgment of the stevedore is supreme; rather, the converse is true. If a stevedore is proceeding improvidently, the vessel owner has the right *and duty* to intervene and prevent the unsafe practice. *Scindia*, 451 U.S. 175-76, 101 S.Ct. at 1626.

ARCASA also confuses the differences between the turnover duty of safe condition and the turnover duty of warning. In the instant case, ARCASA was not found liable for any condition which arose "during the cargo operations." Rather, it was found liable for failing to correct a defective cargo stow which existed prior to the commencement of stevedoring operations. ARCASA argues that if it does not know of an unsafe condition, it has no duty to warn of it. This reasoning is inconsistent with the mandate of the *Scindia* court that a vessel owner is required to take steps, reasonable under the circumstances, to eliminate any hazards. *Id.*

If the actual knowledge standard is implemented, then a vessel owner will be able to avoid liability by not inspecting his vessel, cargo, equipment, work spaces or gear at all. Thus, by failing to have "actual knowledge" of a defective condition or situation, it could not be found liable for any such defect. This argument is simply wrong. The vessel owner should continue to be held liable for any dangers that are within its ability to correct and control, including the method in which the cargo it carries is stowed.

## 4. THE OPEN AND OBVIOUS NATURE OF THE DANGEROUS CARGO CONDITION DID NOT RELIEVE ARCASA OF A DUTY TO CORRECT THE CONDITION.

In a final attempt to provoke a question of law when none exists, ARCASA claims that the Louisiana Fourth Circuit erroneously found that ARCASA violated its duty to warn of an open and obvious condition. Assuming ARCASA is correct in that there may not be a duty to warn (which is denied), the fact that a condition is open and obvious does not relieve the vessel owner of the duty to correct it, if the condition is unavoidable. An examination of the very cases that ARCASA cites evidences the truth of this proposition.

For example, in *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243 (5th Cir. 1982), the court noted that when there is an open and obvious danger which is unavoidable, the plaintiff is entitled to recover. *Id.* at 1247. In fact, a vessel owner can still be held liable when a longshoreman has no other alternative except to work in a dangerous area, but "he need only show that the circumstances made safer alternatives unduly impractical or time-consuming." *Morris v. Compagnie Maritime Des Chargeurs Runis*, 832 F.2d 67, 71 (5th Cir. 1987).

Other cases which ARCASA cites are distinguishable on their facts. For example, *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984), discusses a defective condition of the cargo, not the cargo stow. When the nature of the cargo itself is dangerous, there is no obligation for the vessel owner to remedy the situation; rather, it must turn

over a *vessel* that is safe. In *Taylor*, there was not a dangerous condition until the operations began and cargo fell to the deck. This condition arose during the cargo operations, and it was the stevedore's obligation to remedy the danger, which it failed to do. In the instant case, the problem with the cargo stow pre-existed the cargo unloading operation.

Other cases cited by ARCASA deal with avoidable hazards. *See*, e.g., *Pollizi v. M/V ZEPHYROS NO. II MONROVIA*, 860 F.2d 147 (5th Cir. 1988). In the instant case, the hazard was unavoidable in that if Young had refused to proceed in the face of the danger, he would have lost his job. In that situation, Young had no choice but to proceed despite the danger.

The current state of the law is as it should be: both parties bear a burden, with the vessel owner having a duty to remedy open and obvious dangers which are impractical or impossible to avoid, and the longshoremen have a duty to avoid those open and obvious dangers that are avoidable. This balance of duties is fair and equitable. The balance which ARCASA proposes is neither.

## CONCLUSION

In conclusion, a thorough examination of the facts and law applicable to ENSIDESA's writ indicates that ENSIDESA was not denied due process of law at any time. Courts have been very reluctant to disturb a jury's verdict based on sworn affidavits from certain jurors. ENSIDESA has not met its burden to show that the

alleged jury misconduct was so egregious as to constitute a denial of due process. Therefore, Cooper urges this Honorable Court to refuse ENSIDESA's writ.

Cooper further urges this Honorable Court to refuse ARCASA's writ. Both the District Court and the Louisiana Fourth Circuit applied the appropriate law, and found ARCASA to be partially liable for Young's damages. Furthermore, ARCASA has failed to show why the holding of the Louisiana Fourth Circuit merits discretionary review by this Honorable Court. Therefore, Cooper strongly urges this Honorable Court to refuse ARCASA's writ.

Respectfully submitted,

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